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No. 03-245

In the Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF AMICI CURIAE Ohio School Boards Association, Buckeye Association of School Administrators and Ohio Association of School Business Officials in Support of Petitioners

PROFESSOR TRACY A. THOMAS
THE UNIVERSITY OF AKRON
SCHOOL OF LAW
150 UNIVERSITY AVENUE
AKRON, OH 44325
(330) 972-6617

STEPHEN W. FUNK
Counsel of Record
ROETZEL & ANDRESS
222 S. MAIN STREET
AKRON, OH 44308
(330) 849-6602

Counsel for Amici Curiae

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
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INTEREST OF AMICI CURIAE

The Ohio School Boards Association (OSBA) is a private, non-profit corporation representing all 721 of Ohio's school districts and related educational entities. OSBA's purpose is to encourage and advocate for public education through local citizen responsibility. The Buckeye Association of School Administrators is a non-profit corporation comprised of approximately 1700 school district superintendents and administrators from Ohio's school districts. Its goal is to develop exemplary school leaders and advocate for public education. The Ohio Association of School Business Officials (OASBO) is a non-profit educational management organization representing more than 950 Ohio school district treasurers and business managers. OASBO is dedicated to sharing the best methods of school business administration and improving the prudent fiscal management of Ohio's public schools. The school associations enter this appearance on behalf of the petitioners, public school students, teachers, parents, and individual school administrators, boards, and board members.[1]

STATEMENT OF THE CASE

This case presents the issue of the Ohio Supreme Court's violation of the Due Process Clause of the Fourteenth Amendment by denying an adequate remedy to successful

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties regarding the filing of this brief have been filed with the Clerk. In accordance with this Court's Rule 37.6, amici curiae represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the amici curiae, its members, or its counsel made monetary contributions to the preparation or submission of this brief.

plaintiffs in a school funding case. In five decisions in the case of *DeRolph v. Ohio* from 1997 to the present, the Ohio Supreme Court has declared that Ohio's school funding system is unconstitutional and ordered the state legislature to fix the funding system pursuant to an affirmative, structural injunction.[2] To date, however, the state has continually refused to comply with the Ohio court's injunction by making the required changes in the school funding system. Notwithstanding this open defiance, the Ohio Supreme Court in its decision of May 16, 2003, abruptly issued a writ of prohibition terminating the trial court's jurisdiction to enforce the Court's injunction thereby denying the successful plaintiffs a meaningful remedy in the case. *State ex rel. State of Ohio v. Lewis,* 789 N.E.2d 195 (Ohio 2003) (*DeRolph V*) (App. 1a-16a).

In 1997, the Ohio Supreme Court held that the state's system for funding public schools which relied primarily on local property taxes violated the Ohio Constitution. *DeRolph v. Ohio,* 677 N.E.2d 733, 747 (1997) (*DeRolph I*). To address the systemic violation, the Ohio court awarded

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[2] *DeRolph v. State,* 677 N.E.2d 733 (Ohio 1997) (*DeRolph I*) (finding school funding system unconstitutional and ordering declaratory and injunctive relief); *DeRolph v. State*, 678 N.E.2d 886 (Ohio 1997) (clarifying remedy on state's motion for reconsideration); *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000) (*DeRolph II*) (reaffirming relief to restructure public school funding); *DeRolph v. State,* 754 N.E.2d 1184 (Ohio 2001) (*DeRolph III*) (ordering implementation of specific changes); *DeRolph v. State*, 758 N.E.2d 1113 (Ohio 2001) (ordering mediation); *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) (*DeRolph IV*) (reaffirming required structural relief after failed mediation); *State ex rel. State of Ohio v. Lewis,* 789 N.E.2d 195 (Ohio 2003) (*DeRolph V*) (prohibiting enforcement of relief).

declaratory and injunctive relief. *Id.* It issued an affirmative, structural injunction requiring the state to "fix the system" and undergo a "complete systematic overhaul" to "create an entirely new school financing system" consistent with the constitutional requirement of a thorough and efficient public education system. *Id.* In a subsequent 2000 decision, the Court clarified what it meant by providing a "thorough and efficient" education system and repeated its injunctive command that the state legislature undertake a "complete systematic overhaul" of the school funding system. *DeRolph v. Ohio,* 728 N.E.2d 993 (Ohio 2000) (*DeRolph II*).

When the State failed to respond to the judicial orders, the Ohio Supreme Court in a third decision ordered the legislature to implement specific steps to comply with the prior commands based on the state's own evidence of available monies. *DeRolph v. Ohio,* 754 N.E.2d 1184, 1201 (Ohio 2001); *see DeRolph v. Ohio,* 758 N.E.2d 1113, 1120-21 (Ohio 2001) (Douglas, J., concurring). "The state is hereby ordered to implement the changes described above. . . . If the order receives less than full compliance, interested parties have remedies available to them." *DeRolph III,* 754 N.E.2d at 1201. When the State sought reconsideration of that decision two months later based on the lack of funds, the Ohio Supreme Court referred the case to mediation. *DeRolph,* 758 N.E.2d at 1114. *See* Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation,* 18 OHIO ST. J. ON DISP. RESOL. 391 (2003) (describing the mediation process in *DeRolph* and the potential benefits that might have been gained).

When mediation failed, the Ohio Supreme Court repeated its general structural order to fix school funding:

> The General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient.

DeRolph v. Ohio, 780 N.E.2d 529 (Ohio 2002) (*DeRolph IV*) (App. 19a).

At every step in the remedial process, the Ohio courts have been deferential to the institutional and practical concerns of the legislative branch. *DeRolph IV* (App. 19a). *See Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (holding that courts must defer to institutional defendants in crafting equitable relief). The Ohio courts abstained from designing their own corrective system and deferred to the expertise of the defendants in legislation and education. *DeRolph I*, 677 N.E.2d at 746-48; *DeRolph II*, 728 N.E.2d at 1019-20. The Supreme Court stayed the mandate to insulate the legislature and State from contempt penalties while giving them the necessary time to work through the complexities of correcting the system. *DeRolph I*, 677 N.E.2d at 747; *DeRolph II*, 728 N.E.2d at 1021 (granting defendants more time to comply with constitution). Even after the mediation failure and five years of defiance from the defendant, the Supreme Court continued to grant the Ohio defendants deference by merely repeating the mandate of structural relief rather than imposing more prophylactic or intrusive measures. *DeRolph IV* (App. 19a).

However, the Ohio Supreme Court's deference to the legitimate institutional concerns of the wrongdoer has evolved into complete denial of the plaintiffs' right to relief for a

proven violation of the law. *See* Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623 (2003) (arguing that the courts' deference to institutional defendants results in failure to vindicate plaintiffs' constitutional rights). After twelve years of litigation, and six years of ordered and expected systemic relief, the Ohio Supreme Court abruptly prohibited the trial court from enforcing the injunctive decrees. *DeRolph V* (App. 1a-15a). The Ohio court's flagrant denial of meaningful relief violates the Fourteenth Amendment's constitutional guarantee of due process of law and necessitates this Court's review.

REASONS FOR GRANTING THE PETITION

I. THE OHIO SUPREME COURT'S DENIAL OF A MEANINGFUL REMEDY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THUS PRESENTS A FEDERAL QUESTION NECESSITATING THIS COURT'S REVIEW.

Ubi jus, ibi remedium. Where there's a right, there must be a remedy. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768). The Ohio Supreme Court dishonored this ancient legal maxim by arbitrarily prohibiting all remedies for unconstitutional state action previously ordered by that same court in the case. This arbitrary refusal to provide a remedy to enforce important state constitutional rights triggers the federal Due Process Clause and necessitates this Court's review.

The Ohio Supreme Court's denial of a meaningful remedy contradicts this Court's command that the Due Process Cause of the Fourteenth Amendment requires an adequate remedy

for legal rights. *See State Farm v. Campbell,* 123 S. Ct. 1513, 1519 (2003) (the right to reasonable and non-arbitrary remedy implicates both substantive and procedural due process). This Court has recognized that the Due Process Clause requires an adequate remedy for an established violation of law. *See Reich v. Collins,* 513 U.S. 106 (1994); *Harper v. Virginia Dep't of Tax.,* 509 U.S. 86 (1993); *McKesson Corp v. Division of Alcoholic Beverages,* 496 U.S. 18 (1990). In the tax cases of *Reich, Harper,* and *McKesson,* this Court held that the Due Process Clause requires state courts to provide a successful plaintiff with a minimally-adequate remedy that provides "meaningful" relief. *Reich,* 513 U.S. at 108, 114; *Harper,* 509 U.S. at 100-102; *McKesson,* 496 U.S. at 31, 39. While the state court has flexibility to choose among appropriate equitable and monetary remedies, it cannot, consistent with federal due process, select a remedy that fails to provide meaningful relief to the plaintiff.[3] *Harper,* 509 U.S. at 101; *McKesson,* 496 U.S. at 39.

Additionally, in the punitive damages cases, this Court has found arbitrary and unreasonable state court remedies to violate the Due Process Clause. *State Farm,* 123 S. Ct. at 1519-20; *BMW of North America v. Gore,* 517 U.S. 559 (1996); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 18 (1991). These cases evaluating excessive state court remedies are grounded in the core concern of federal due process regarding the unreasonableness of state action. *State Farm,* 123 S. Ct. at 1520; *Gore,* 517 U.S. at 587 (Breyer, J.,

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[3] *Harper,* 509 U.S. at 102 ("Virginia is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined. State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy.").

concurring) ("This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion."); *Haslip,* 499 U.S. at 59 (O'Connor, J., dissenting) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process--of the law in general--is to allow citizens to order their behavior."). Where state court remedies are arbitrary and unreasonable, this Court has invalidated that relief under the Due Process Clause. *State Farm,* 123 S. Ct. at 1521; *Gore*, 517 U.S. at 560.

The Ohio Supreme Court's *DeRolph V* decision, which denies effective relief, contradicts this Court's precedent holding that the Due Process Clause requires a modicum of reasonable relief to vindicate violations of legal rights. Indeed, as discussed more fully below, the right to minimally-adequate relief is a hallmark of our historic jurisprudence and is therefore a fundamental right that has and should be protected by the Fourteenth Amendment's Due Process Clause. The case presented for review, therefore, asks this Court simply to rely upon the existing precedent to endorse the historic maxim that legal rights, at a minimum, require some adequate remedial vindication.

A. The Right to a Remedy is a Fundamental Right.

The right to a remedy is a fundamental right historically recognized in our legal system as central to our concept of ordered liberty. *Cf. Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). "The principle that rights must have remedies is ancient and venerable." Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach,* 76 WASH. L. REV. 67, 71 (2001); *see* Tracy A.

Thomas, *Congress' Section 5 Power and Remedial Rights,* 34 U.C. DAVIS L. REV. 673, 689-90 (2001) (explaining that the notion of a remedy as a necessary part of any legal substantive right is not a new idea). In 1703, the right to a remedy was expressly recognized in Anglo-American law. In *Ashby v. White*, the Chief Justice of the King's Bench stated the basic right to a remedy:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.

92 Eng. Rep. 126 (K.D. 1703).

This Court from its earliest time has recognized the bedrock principle that deprivations of law require remedies. In *Marbury v. Madison,* Chief Justice Marshall endorsed the common law requirement mandating a remedy for every wrong:

> It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . For it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.

5 U.S. (1 Cranch) 137, 163-66 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23). As the *Marbury* Court acknowledged, the right to a remedy is a core component of ordered liberty:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Id. at 161, 163; *see also United States v. Loughrey*, 172 U.S. 206 (1898) ("The maximum 'ubi jus, ibi remedium,' lies at the very foundation of all systems of law.").

Additional support for the historical presence of the right to a remedy is found in the state constitutions of three fourths of the states which contain express remedial guarantees. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in Federal Courts*, 38 HASTINGS L. J. 665, 676 n.68 (1987). These guarantees requiring the right to a remedy in open court derive from Lord Coke's interpretation of the Magna Carta. David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199 (1992). First appearing in the late 1700s, the state constitutional rights to a remedy were adopted to ensure the independence of the judiciary against corruption and control by the other political branches. Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655, 656-59 (1999).

In Ohio, the right to a remedy is a fundamental right guaranteed by the state constitution. OH. CONST. ART. 1 § 16. The state constitution provides: "All courts shall be open,

and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *Id.* (adopted in current form in 1851 based on 1802 predecessor). Ohio has interpreted this provision to require a "meaningful remedy." *Sorrell v. Thevenir,* 633 N.E.2d 504, 513 (Ohio 1994) (interpreting constitutional guarantee as encompassing the fundamental right to a "meaningful remedy" that provides satisfaction for injuries sustained); *Gaines v. Pre-Term Cleveland, Inc.*, 514 N.E.2d 709, 716 (1987) ("Denial of a remedy and denial of a *meaningful* remedy lead to the same result: an injured plaintiff without legal recourse."). Thus, Ohio has accepted the right to a meaningful remedy as a fundamental right that cannot be abridged.

Furthermore, it is appropriate to consider the right to an adequate remedy as a fundamental right that cannot be arbitrarily denied. Remedies perform two critical functions in the law. First, they give meaning to abstract rights. Owen Fiss, *The Forms of Justice,* 93 HARV. L. REV. 1, 52 (1979); Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885-97 (1999). Rights standing alone are simply expressions of social values. It is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees. Without remedies, rights are mere ideals, promises, or pronouncements that may or may not be followed. Zeigler, *Rights Require Remedies, supra* at 678. As Justice Holmes expressed, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp." *Ex parte United States,* 257 U.S. 419, 433 (1922). Like manners, rights simply become something that one should do, but not something that one is compelled to do.

The enforcement power of the remedy is the quality that converts pronouncements of ideals into operational rights. It is this enforceability that makes something a legal rather than moral or natural right. Zeigler, *Rights Require Remedies, supra* n.72; I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 247-55 (1980). The definition of a claim as a "legal" right depends upon the availability of this enforcement:

> It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions of commands which pretend to be laws will, in fact amount to nothing more than advice or recommendation.

THE FEDERALIST NO. 84, AT 110 (A. Hamilton). The remedy is thus the integral part of each right that is ultimately necessary to the effectuation of the rule of law. For without a remedy, judicial decisions are merely advisory opinions, hypothetical undertakings with no practical effect. Thomas, *Remedial Rights*, *supra* at 659-60. Without remedies, the law simply has no force in society. Individuals need not conform their behavior and established rights may simply be ignored.

B. The Ohio Supreme Court's Denial of an Adequate Remedy Rises to a Level of a Federal Due Process Violation.

The federal due process right to an adequate remedy was arbitrarily denied to the school petitioners by the Ohio Supreme Court in this case. Basic notions of fairness and liberty embodied in the Due Process Clause require that some minimally adequate remedy be awarded when plaintiffs have successfully established the violation of a legally protected right. *See* Thomas, *Remedial Rights, supra* at 758-66

(collecting authorities and proposing parameters for the adequacy of a remedy). The arbitrariness of the Ohio court's decision is apparent on the face of the opinion. The *DeRolph V* decision itself reaffirms the existence of a constitutional violation -- yet it simultaneously prohibits any remedy for that violation. *DeRolph V* (App. 10a). At the end of the day, the school plaintiffs were awarded nothing more than an advisory opinion suggesting that the State correct the unconstitutional funding. *Id.*

There is no legitimate basis for the Ohio Supreme Court's action denying all effective relief in the case. The Court disingenuously suggests that the reason for the denial of all relief was because the trial court "patently and unambiguously lacked jurisdiction" to conduct remedial proceedings. *DeRolph V* (App. 11a). However, it is well-established that a trial court has general authority to conduct enforcement proceedings to award further relief in accordance with the declaration of rights. OHIO CONST. ART. IV, § 4; Ohio Civ. R. 70. Moreover, the Ohio Supreme Court itself expressly required the trial court to assume such authority in the *DeRolph* case in three of its prior opinions. *DeRolph I,* 677 N.E.2d at 747; *DeRolph IV,* 780 N.E.2d at 282. Instead, the Supreme Court simply used the writ of prohibition directed at the trial court to terminate its own previously issued injunction. There was, however, no legal basis for terminating relief. Termination of injunctive relief was arbitrary in the absence of any indication that the defendant acted in good faith to substantially comply with the order. *See Agostini v. Felton,* 521 U.S. 203 (1997); *Board of Ed. of Okla. City Pub. Sch. v. Dowell,* 498 U.S. 237, 250 (1991). Nor was modification of the injunction a rational judicial response since there was no change in the law or facts since the prior four decisions in the case. *See Agostini,* 521 U.S. 203. The Ohio court's flagrant disregard for existing law and

lack of basis for denying a remedy (such as sovereign immunity, retroactivity concerns, or statute of limitations barriers) is simply arbitrary and violates federal due process guarantees.

The denial of a remedy is even more arbitrary when considered in light of other state supreme courts who have considered remedies for unconstitutional school funding. These courts have not denied or frozen relief, but to the contrary, have adopted more specific remedial measures in order to ensure compliance.[4] The Ohio Supreme Court's arbitrary denial of an adequate remedy in violation of due process conflicts with the holdings of other state supreme courts which have recognized the requirement of adequate relief and accordingly, have imposed meaningful remedial measures. Such a conflict among sister state supreme courts further supports this Court's consideration of the federal due process issue. *See* S. Ct. R. 10(b).

Compounding the denial of the constitutionally-required remedy is the Ohio court's flagrant arbitrariness in first

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[4] *E.g. Campaign for Fiscal Equity, Inc. v. New York,* 2003 N.Y. slip op. 15615, 2003 WL 21468502 (N.Y. June 26, 2003) ("[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them. Surely there is a remedy more promising, and ultimately less entangling for the courts, than simply directing the parties to eliminate deficiencies, as the State would have us do."); *Tennessee Small School Systems v. McWherter,* 91 S.W.3d 232, 233 (Tenn. 2002) (reviewing adequacy of legislature's compliance with ordered remedy and imposing additional relief in third supreme court decision in the case); *Abbott v. Burke,* 575 A.2d 359, 385-91 (N.J. 1990); *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989).

promising injunctive relief, and then switching to deny any such relief. *See Reich v. Collins*, 513 U.S. 106 (1994). The right to a particular remedy in this case vested when the Ohio Supreme Court first announced the injunction in 1997. Its repeated endorsements of the same injunction further entrenched the expectations of the plaintiffs to affirmative relief and to this particular injunction. The Court then abruptly switched five months after the last affirmation of the remedy and quickly terminated all relief. *DeRolph V* (App. 1a-16a). This remedial "bait and switch" is an egregious violation of due process. As this Court found in *Reich v. Collins*, while a state court has flexibility under equity as to what particular remedy it will provide for an adjudicated wrong, it may not hold out what plainly appears to be a clear and certain remedy and then declare that no such remedy exists. 513 U.S. at 108. The Ohio Supreme Court in three decisions established a clear and certain remedy for the unconstitutional school funding, and then inexplicably switched to declare that no such remedy or any other exists in the case. Such flagrant arbitrary action, this Court has held, offends the basic notions of fairness required by due process.

II. FEDERALISM IS NOT SERVED BY ALLOWING STATE COURTS TO ARBITRARILY REFUSE TO ENFORCE LEGAL RIGHTS.

The threat to federalism raised by the Ohio Supreme Court's denial of a meaningful remedy raises a serious legal question that should be addressed by this Court. While this Court is appropriately cautious in reviewing state court action, this case constitutes blatant unconstitutional action by a state court that demands the intervention of this Court. *See Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (reviewing state court injunction for violation of state law found to violate due process and equal protection); *Reich*, 513 U.S. at 106

(reviewing state court remedy that failed to provide meaningful relief); *Madsen v. Women's Health Center*, 512 U.S. 753 (1994) (reviewing state court injunction alleged to violate federal Constitution); *McKesson,* 496 U.S. at 18 (reviewing state court injunction providing inadequate remedy in violation of federal due process); *Mitchum v. Foster*, 407 U.S. 225 (1972) (reviewing state court injunction for violation of state law where decree raised federal constitutional issues); *see* 28 U.S.C. 2283 (2000) (exception to Anti-Injunction Act authorizes federal courts to intervene in state court proceedings to redress constitutional harms committed by state actors).

The danger from action like that of Ohio's highest court is that state courts will not viewed as a co-equal partner in the federal system for the enforcement of legal rights. Our judicial system – both federal and state – is premised on the universally-accepted principle that court judgments have meaning and that judicial pronouncements will be backed up by all necessary enforcement actions that may be required to ensure compliance with the law. Without remedies and remedial enforcement, rights are mere ideals that need not be followed. *Florida v. Georgia,* 58 U.S. 478 (1854) ("The essence of a right is, that it may be exercised contentiously, adversely. *Ubi jus ibi remedium.* Not that it be a mere "favor to be granted or withheld by any litigant."); Thomas, *Remedial Rights, supra* at 687-94. The enforcement component of a remedy is its critical aspect that distinguishes it from an idea and actualizes the right in a tangible manner:

> The power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no

> remedy, although a clear and undeniable right should be shown to exist.

Kendall v. United States, 37 U.S. (12 Pet.) 524, 623 (1838). Neutralizing a remedy by eliminating its enforcement mechanisms and converting it into a mere pronouncement of favored behavior effectively nullifies the attendant right and deprives the courts of the authority and respect necessary to protect our legal rights.

Such a nullification of state constitutional rights was perpetuated in this case by the Ohio Supreme Court. The Court's denial of an enforceable remedy rendered the state constitutional guarantee a mere aspiration rather than an operative right. Yet the Court previously held, to the contrary, that the constitution's education provision was not merely an ideal or a political question, but rather, was a directive guarantee. *DeRolph I*, 677 N.E.2d at 737, 740. Indeed, the Ohio court itself acknowledged the danger of judicial nullification of rights:

> [W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular act unconstitutional would be a nullity.

DeRolph II, 728 N.E.2d at 1002. These words, however, ring hollow in light of the subsequent action of the Court, which did in fact nullify the right and amend the state constitution to delete the right to a thorough and efficient education. The Court achieved a *de facto* constitutional

amendment removing the educational guarantee which has been an important part of the Ohio Constitution since 1851. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51, 702 (1851); *see* Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, CLEV. STATE L. REV. (forthcoming 2003) (detailing historical origins of Ohio's constitutional right to a thorough and efficient education), *available at* www.uakron.edu/law/lawfaculty/obrien.php. The educational provision was reconsidered twice by constitutional conventions in 1874 and 1912, and both times it was endorsed and re-approved as a critical value for the state. O'Brien & Woodrum, *supra* pt. III.

Disputes over remedies provide a convenient way for dissenters to resist conformance with legal guarantees. Frank H. Easterbrook, *The Limits of Judicial Power in Ordering Remedies: Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103 (1991) ("Most disputes over remedies in civil rights cases have nothing to do with remedies and everything to do with substantive entitlements."); Paul Gewirtz, *Remedies and Resistance,* 92 YALE L. J. 585, 588 (1983) ("Criticism of a remedy, therefore, may reflect criticism of the underlying right."). Courts can pronounce rights, but then default in the remedy to avoid a politically unpopular result. Defendants learn they can simply defy court orders and refuse to comply with the court directives. In so doing, the dissenters are able practically to neutralize established rights with which they personally or politically disagree. Accordingly, this Court has emphasized that compliance with judicial remedies is mandatory. *Cooper v. Aaron*, 358 U.S. 1 (1958); *cf. Middlesex County Sew. Authority v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 24 (1981) ("For rules are meant to be obeyed, and those who violate them should be held

responsible for their misdeeds."). A remedy cannot be used, as the Ohio Supreme Court did, as a mechanism to circumvent democratically-created and constitutionally-protected legal guarantees.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

PROFESSOR TRACY A. THOMAS
THE UNIVERSITY OF AKRON
SCHOOL OF LAW
150 University Ave
Akron, OH 44325
(330) 972-6617

STEPHEN W. FUNK
Counsel of Record
ROETZEL & ANDRESS
222 S. Main Street
Akron, OH 44308
(330) 849-6602

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